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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 564

NATIONAL CAN CORPORATION,
Appellant,

vs.

STATE TAX COMMISSION OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

HERBERT M. BRUNE,
1225 Mathieson Building,
Baltimore 2, Maryland.

M. WILLIAM ADELSON,
1035 Mathieson Building,
Baltimore 2, Maryland.
Attorneys for Appellant.

The Daily Record Co., Baltimore 3, Md.

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statutory approach to the problem, may well have significance in many other states. Specifically:

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No. ------

NATIONAL CAN CORPORATION,
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STATE TAX COMMISSION OF MARYLAND,
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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant appeals from the mandate and final decree of the Maryland Court of Appeals, entered on July 9, 1959, affirming a decree of the Circuit Court No. 2 of Baltimore City, which dismissed its appeal from an assessment of personal property for general property taxation made by the State Tax Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is reprinted in Appendix B. It is reported as *National Can Corporation v. State Tax Commission of Maryland*, 220 Md. 418, 153 A. 2d 287. The opinion of the Circuit Court No. 2 of Baltimore City is reprinted in Appendix B, but is unpublished.

JURISDICTION

(i) The proceeding was initiated as an appeal from the action of the State Tax Commission of Maryland in making an assessment of personal property for general property taxation.[1] It was brought in the Circuit Court No. 2 of Baltimore City, pursuant to the then Section 255(b) of Article 81 of the Annotated Code of Maryland (1951 edition), which is now Section 259(b) of Article 81 of the Annotated Code of Maryland (1957 edition). After dismissal of this appeal, Appellant, under the aforesaid statute, invoked its right of further appeal to the Maryland Court of Appeals.

(ii) The final decree of the Maryland Court of Appeals was filed on July 9, 1959. Notice of appeal to the United States Supreme Court was filed in the Maryland Court of Appeals on October 6, 1959.

(iii) Jurisdiction on this appeal is conferred by 28 U.S.C. sec. 1257(2).

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[1] The State Tax Commission (now the State Department of Assessments and Taxation by virtue of Chapter 757, Laws of Maryland, 1959) exercises original jurisdiction in the assessment of all corporate personal property, but assessments of personal property owned by individuals and partnerships, and of all real property, are made by assessors in the various local sub-divisions. Article 81 of the Annotated Code of Maryland (1957 ed.), sec. 13(b), and Cum. Supp. (1959 ed.), sec. 13(a).

(iv) Cases sustaining the jurisdiction of the Court are:

Hillsborough Township v. Cromwell, 326 U.S. 620;

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441;

Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350;

Welch v. Henry, 305 U.S. 134.

STATUTE INVOLVED

This case solely involves the validity of Chapter 73, Laws of Maryland, 1958, pages 247-252. This Act, because of its length, is set forth in Appendix A.

QUESTIONS PRESENTED

1. In the assessment of Maryland real property and personal property for general property taxation, is the bald declaration that these two broad classes of property constitute separate classes, as provided in Chapter 73 of the Laws of Maryland, 1958, with "inflation" *required* to be disregarded in the valuation of personal property, but allowed as a discount factor in valuing real property, a reasonable and valid classification of property for purposes of assessment for general property taxation, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does the direction of Chapter 73 of the Laws of Maryland, 1958, that *only* in the assessment of real property, an allowance be made for a wholly general and undefined "inflation", constitute a standard for guidance of administrative officials sufficiently definite to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States for a valid delegation of legislative power?

3. Is the Appellant, as a personal property taxpayer, entitled to complain of the aforesaid unconstitutionality, under the Due Process Clause, of such statutory allowance for an indefinite "inflation" granted to real property taxpayers, when the nullification of the "inflation" allowance results in a requirement that both real and personal property be assessed on the same basis, and consequently entitles Appellant to demand that its personal property assessment be reduced to the existing devalued level for real property, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the doctrine of such cases as *Hillsborough Township v. Cromwell*, 326 U.S. 620?

4. In the light of the "recent transactions" limitation, necessary for retroactive tax legislation to satisfy the Due Process requirements of the Fourteenth Amendment to the United States Constitution, under the rule of *Welch v. Henry*, 305 U.S. 134, does the retroactive provision of Chapter 73 of the Acts of 1958, enacted April 4, 1958, rendering it applicable to sustain an over-assessment of the taxpayer's average monthly inventories held from January to December, 1956, there being an intervening general legislative session in 1957, result in the taking of taxpayer's property without due process of law?

STATEMENT OF THE CASE

For a number of years prior to 1957, Maryland law and custom dictated the assessment of tangible personal property for general property taxation at its full cash value. Inventories, the principal item involved in this appeal, were taken at cost or market, whichever was lower. The same legal requirement of full cash value in assessments of real property, was ignored in favor of a practice throughout the different Maryland political sub-divisions of assess-

ing such real property at varying percentages of its full cash value. In the case of *Sears, Roebuck & Co. v. State Tax Commission*, 214 Md. 550, 136 A. 2d 567, (reprinted in Appendix B), decided November 22, 1957, the Maryland Court of Appeals held that this discriminatory method of assessing real and personal property had no legal basis, in view of the Maryland statute requiring assessment of both real and tangible personal property at "full cash value" (Section 14 of Article 81 of the Annotated Code of Maryland (1957 edition), which was Section 13 in the 1951 edition). The case was remanded for a reduction of the taxpayer's tangible personal property assessments to the level of the real property assessments, following the rule of *Hillsborough Township v. Cromwell, supra.*

Shortly before the *Sears* decision was announced, the Appellee, following its aforesaid discriminatory practice, entered a final assessment against Appellant for the year 1957, measured by its personal property holdings during the year 1956. Subsequent to the *Sears* decision, Appellant filed its appeal to the Circuit Court No 2 of Baltimore City, upon which no action was taken until after the enactment on April 4, 1958, of Chapter 73 of the Laws of Maryland, 1958, (hereinafter referred to as Chapter 73). Retroactive to January 1, 1957, Chapter 73 attempted to legalize the aforegoing discriminatory assessing practices of the Commission, through separate classification of real and personal property. Although a general legislative session had intervened in 1957, at which no action was taken, Chapter 73 sought to validate retrospectively the 1957 assessment against Appellant, which had been invalidated by the *Sears* decision.

Chapter 73 continued the requirement that both real and tangible personal property be assessed at their "full

cash value." In the case of real property, however, "full cash value" was defined to mean "current value less an allowance for inflation," while in the case of personal property, it was defined to mean "current value without any allowance for inflation." "Inflation" is *not* defined in the act in any manner, nor measured from any base period.

The following trial testimony of the Secretary of the State Tax Commission, appearing at pages 22-23 of the Record Extract,[2] filed in the Court of Appeals, makes it clear that real and personal property assessments for the year 1957 were determined in accordance with the same discriminatory practices which were condemned in the *Sears* case:

> "Q. All I am getting at, Mr. Ward, is this; in your direct examination by Mr. Waters you testified, I believe, that as a result of the prior practices before the decision in the Sears, Roebuck case, real estate was assessed at approximately 60%, that is in some places its current sale value, where as personal property was assessed at its full market value; is that correct? A. That is correct. And if you did what the Court of Appeals supposedly did in each case, and if we had to make the devaluation factor in personal property to the extent of 40%, it would amount to that loss of revenue.
>
> "Q. And doing it under Chapter 73 of the Acts of 1958, that is still the practice of the Commission, in other words Chapter 73 purports to legalize what had been previously the practice? A. Yes, we propose to continue to assess real estate at its full cash value with allowance for inflation, if any exists, and also with allowance for abnormalities, and with personal property we plan, on inventories we plan to assess at cost or market, whichever is lower, without any regard for inflationary influences.

[2] The Record Extract is hereinafter referred to as E.

"(The Court) In other words, Chapter 73 puts a stamp of approval on your former practice, that is what you are saying.

"(The Witness) That's right, that is what I am saying.

"Q. In other words, Mr. Ward, what you say is true before the Sears, Roebuck decision and also true now under Chapter 73 applied to the assessments for the year 1957. Assessments for the year 1957 were made in the same manner as you have just described? A. That is correct."

Reviewing this record, the Maryland Court of Appeals commented that "this case is a sequel to the *Sears* case" (page 423 of 220 Md., 290 of 153 A. 2d). In the *Sears* case the assessment practices of the Commission were somewhat more fully described, as indicated by the Maryland Court's opinion in that case, from which the following is quoted (214 Md. at pages 554-5, 136 A. 2d at page 569):

". . . With respect to real estate, the Commission has directed its assessors to deduct amounts resulting from inflationary influences from the value of the properties to be assessed. This deduction reduces the value of real estate for tax purposes below its current value. No similar deduction is made in the case of assessment of stock in trade. In assessing inventories inflationary influences as such are not considered. Instead the assessment is at cost or market, whichever is lower. In the assessment of such inventories abnormalities, such as pilferage, are considered in arriving at cost or market. The level of the aforegoing assessments to current value is the direct result of the policies and practices of the Commission which by law is required to supervise all assessment of real property within this State. Various studies had been made as to the level of assessments to current values of real estate in the counties and in Baltimore City. These studies vary in scope and in method. However, they

sustain the same factual conclusion that the ratios of assessments to current values of real estate in Maryland ranged from twenty-five per centum to sixty per centum at the time this case was heard by the Commission."

How The Federal Questions Are Presented

In the present case, after Appellant received final notice of assessment from the State Tax Commission, an appeal was seasonably taken to the Circuit Court of Baltimore City, as provided by statute, on December 6, 1957. At that time the *Sears* case had been decided, but Chapter 73 had *not* yet been enacted. The Constitutional issues were raised by the following portion of the petition (E. 5), couched in the identical language successfully used by the Petitioner in the *Sears* case:

> "(e) The assessment unlawfully discriminates against your Petitioner by reason of the fact that the State Tax Commission in making the assessment used a method which was calculated to value your Petitioner's stock in business and tools and machinery in excess of their full cash value, with the result that such method of assessment was and is unlawful and in violation of the Fourteenth Amendment to the Federal Constitution and Article 15 of the Declaration of Rights of the Constitution of Maryland."

Chapter 73 was passed before the trial of the action, and consequently, at the trial, the question of constitutionality of that act under both the Maryland Constitution and the Fourteenth Amendment to the United States Constitution was fully argued and briefed by both sides. The trial judge made this clear in his Memorandum and Order (Appendix B), filed April 8, 1959, where he said:

> "This is an appeal from an assessment of the personal property of National Can Corporation for the year 1957, made by the State Tax Commission of

Maryland in the exercise of its original jurisdiction. It raises the question of the constitutionality of Chapter 73 of the Laws of Maryland of 1958.

"The ground for this appeal is that Chapter 73 is unconstitutional and void, both in substance and to the extent that it was made to apply retroactively to the year 1957.

* * * * * *

"This Court finds that Chapter 73 of the Laws of Maryland, 1958, insofar as it authorizes the separate classification of real property and personal property, is valid and constitutional both under the Maryland Constitution and the Federal Constitution.

"Petitioner argues separately that Chapter 73 cannot be applied retroactively to January 1, 1957, and to that extent is unconstitutional. Here also, the preamble to the Act gives the reasons the Legislature made the statute retroactive. In the main, the Legislature sought to avoid a substantial loss of revenue by the State."

Federal constitutional questions were briefed and fully argued before the Maryland Court of Appeals. They are discussed at length in its opinion, 220 Md. 418, 153 A. 2d 287. The contention that the classification in Chapter 73 is invalid is discussed at pages 429-435 of 220 Md., and 294-297 of 153 A. 2d; the contention that the absence of standards to guide the Commission in making an allowance for inflation makes the act invalid is discussed at pages 435-436 of 220 Md., and 297-298 of 153 A. 2d; and the contention that Appellant is entitled to a reduction of its taxes to the level of the real property taxes is discussed at pages 436-438 of 220 Md., and 298-299 of 153 A. 2d. The question of retroactivity is discussed at pages 438-442 of 220 Md., and 299-301 of 153 A. 2d. Furthermore, the dissenting opinion of Judge Henderson, at pages 442-447 of 220 Md., and 301-304 of 153 A. 2d, is based entirely on Fed-

eral Constitutional grounds, since he accepts the opinion of the majority that Chapter 73 does not violate any state constitutional provision.

THE QUESTIONS ARE SUBSTANTIAL

This case raises substantial federal questions in the field of state property taxation, which should be decided by this Court, not only because of the situation in Maryland, but for the guidance of other states[3] faced with similar problems in the classification of property for taxation, for the following reasons:

1. *Separate Classification of Real and Personal Property Through An "Inflation" Allowance to the Former.*

The Maryland Legislature, in passing Chapter 73, and the Maryland Court of Appeals, in upholding it, assumed that the separate classification of real property and tangible personal property is valid in all cases. In this case, however, the classification was not based on differences between real property and tangible personal property. It was made solely to discriminate, in favor of real property taxpayers, by giving only to them, an allowance for inflation, although it is a factor affecting the value of both real and personal property. As this Court said during the last term, in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, at page 527:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' (Cases cited)."

[3] Chapter 73 in its references to "inflation" appears to be unique, and to have no counter-part in any other state property tax legislation.

2. "Inflation" an Invalid Standard for Reducing Assessments.

As pointed out above, Chapter 73 would impose an unreasonable discrimination against the owners of tangible personal property, even if "inflation" were properly defined in the act. However, "inflation" is undefined. The statute sets up no base year, no index, and no guide or standard whatever for administrative officials in determining the amount of deduction for the favored real estate. The uncontrolled discretion granted assessors permits a virtually unlimited allowance in reducing real property valuations under the provisions of this act. The conscience and mood of the individual assessor is substituted for more definite, objective guides. The requirements that statutes be definite and understandable, and that power should not be delegated to administrative officials without a definite standard, are requirements of the Fourteenth Amendment which are fundamental in all fields of law, *Connally v. General Construction Co.*, 269 U.S. 385; *Burstyn, Inc. v. Wilson*, 343 U.S. 495; *Staub v. City of Baxley* 355 U.S. 313, and particularly so in taxation. *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 24 A. 2d 911.

The arbitrary and capricious nature of the Maryland practice is clearly described in the dissenting opinion of Judge Henderson in this case at pages 445-447 of 220 Md., 303-304 of 153 A. 2d. The use of "inflation" in this statute can be given meaning only by reference to the practices of the Commission which were condemned as intentionally arbitrary and discriminatory by the Maryland Court in the *Sears* case, *supra*. The question is whether the taxpayer has been deprived of equal protection of the laws by State action, and it is immaterial that the discrimina-

tory State action is now authorized by the legislature, whereas formerly it was taken by administrative officials without authorization. As this court said in *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

If the attempted classification is invalid because based on a vague and indefinite standard, or for any other reason, the quotation above is clearly applicable.

3. *Standing of Personal Property Taxpayer to Complain of Discrimination Through Invalid "Inflation" Allowances to Real Property Owners.*

At page 436 of 220 Md., and 297 of 153 A. 2d, the majority of the Maryland Court assumes in this case, without deciding, that the vagueness of the standard of "inflation" renders the provision for a reduction in the real property taxes invalid, but concludes that, as a personal property taxpayer, Appellant is without standing to complain of such invalidity pertaining to real property assessments. It is the position of Appellant, as it was of the dissenting judge, that it is necessary to decide whether "inflation" is a valid standard. If it is not, the separability clause of Chapter 73 will not save the classification, since there is then no valid, or even colorable, statutory authority for a reduction in real property assessments, which is denied personal property assessments. As Judge Henderson said,

in dissent, at pages 444-445 of 220 Md., pages 302-303 of 153 A. 2d:

> "The argument that the legislature would have passed the Act with the subsection as to real estate omitted, and hence that the Act is saved by the separability clause, seems untenable. The declared purpose was to continue the disparity. If both real and personal property were to continue to be assessed according to the same standard of full cash value, there would have been no occasion to amend the pre-existing law. The vice found in the *Sears* case was that the State Tax Commission had deliberately undervalued, or permitted the undervaluation, of real estate. If statutory authority for the practice is stricken down, we are just where we were before, unless the *Sears* case is to be overruled. If *Sears* is overruled we are faced with the question of the Fourteenth Amendment.
>
> "The majority opinion seems to hold, however, that the difference in treatment can be supported on the ground that real estate and personal property are now placed in different classes. But such 'classification', to my mind, is wholly illusory if, as the Court assumes, real and personal property are to be taxed at the same rate and upon the same assessable basis. If real and personal property are required to be treated alike for tax purposes, a mere legislative declaration that they are different in other respects is meaningless. The complaint that they are not treated alike in practice goes to the heart of the matter and raises again the question decided in the *Sears* case."

The taxpayer here, as an owner of personal property which is assessed at its full cash value as provided by statute, has standing to raise the question of discrimination, under the Equal Protection Clause of the Fourteenth Amendment, where owners of real property are given more favorable treatment because of an unconstitutional statute. *Hillsborough Township v. Cromwell, supra.* The position

taken by the Maryland Court, at pages 436-438 of 220 Md., and 298-299 of 153 A. 2d, and criticized in the dissenting opinion, contradicts and undermines the position taken by this Court in the line of cases which culminated in the *Hillsborough Township* case, *supra*. An affirmance of the decision of the Maryland Court in the instant case would throw doubt on the clear expressions of this Court as to the obligation of the State itself to achieve equality, even, if necessary, by reduction of an otherwise valid assessment, and would introduce an element of uncertainty into what is now a settled rule of constitutional law.

4. *Retroactive Application of Chapter 73.*

This Court has never directly passed on the validity of retroactive general property tax legislation. The leading case in this Court, on the general subject of retroactive taxation, is *Welch v. Henry*, 305 U.S. 134, involving an income tax enacted as an emergency measure because of depression exigencies.

The instant case involves a different question — the validity of a retroactive general property tax, dating back to a period prior to the statutory date of finality; the law being enacted after this litigation had been started. Although a dictum in *Welch v. Henry, supra*, comments on the validity of a retroactive general property tax, (subject presumably to the "recent transactions" rule recognized in that case), the cases cited in support of the statement did not refer to the general property tax. On the contrary, as Mr. Justice Roberts made clear in his dissent (305 U.S. at p. 159), the authorities relied upon deal with taxation of omitted property (*Citizens National Bank v. Kentucky*, 217 U.S. 443), and special benefit assessments (*Philip*

Wagner, Inc. v. Leser, 239 U.S. 207; *City of Seattle v. Kelleher*, 195 U.S. 351).

Moreover, since the assessment of taxpayer's monthly inventories held during the year 1956 was affected by the retroactive application of Chapter 73, enacted in 1958, such retrospective operation reached back into the past to an extent not permitted in *Welch v. Henry, supra.* It was there held that action is valid if taken at the *next general legislative session.* In the instant case, there was such a general session which convened in January, 1957, but no action was taken until the following year, when Chapter 73 was enacted on April 4, 1958.

It is of importance for the guidance of state legislatures generally that this Court should settle the limits of permissible retroactivity in the field of general property taxation, in a case where such a tax, enacted during a normal period where there was no necessity for emergency State action, is directly involved.

CONCLUSION

It is submitted that the decision of the Maryland Court of Appeals fails to recognize the limitations imposed by the Equal Protection Clause of the Fourteenth Amendment upon the State's power to classify property for the purposes of taxation; fails to recognize the Due Process requirement of the Fourteenth Amendment for a definite standard for the guidance of administrative officials; fails to recognize the obligation on the State under the Equal Protection Clause of the Fourteenth Amendment and the doctrine of *Hillsborough Township v. Cromwell, supra,* to provide a remedy for the taxpayer whose property is assessed at full value where other property which should similarly be assessed at full value is nevertheless syste-

matically underassessed; and permits retroactive application of an act levying a property tax beyond the limits permitted by the Due Process Clause of the Fourteenth Amendment and the doctrine of *Welch v. Henry, supra.*

From the foregoing, it is respectfully submitted that the questions presented by this appeal are substantial and of great public importance since the general property tax is the foundation of most local tax systems.

Respectfully submitted,

HERBERT M. BRUNE,
1225 Mathieson Building,
Baltimore 2, Maryland,

M. WILLIAM ADELSON,
1085 Mathieson Building,
Baltimore 2, Maryland,
Attorneys for Appellant.

APPENDIX A

CHAPTER 73, LAWS OF MARYLAND, 1958.*
(House Bill 28)

~~AN ACT to repeal and re-enact, with amendments, effective January 1, 1957, Section 5 of Article 81 of the Annotated Code of Maryland (1951 Ed.), title "Revenue and Taxes", sub-title "Classification of Taxes", and to repeal Section 13 of Article 81 of the Annotated Code of Maryland (1957 Supp.), title "Revenue and Taxes", sub-title "Method of Assessment", and to enact in lieu thereof a new Section with three sub-sections, to be known as Section 13, sub-sections (a), (b) and (c), and to follow immediately after Section 12 of said Article, and to repeal and re-enact, with amendments, Sections 14 and 22 of Article 81 of the Annotated Code of Maryland (1951 Ed. and 1957 Supp.), title "Revenues and Taxes", sub-title~~

AN ACT TO REPEAL AND RE-ENACT, WITH AMENDMENTS, EFFECTIVE JANUARY 1, 1957, SECTION 6 OF ARTICLE 81 OF THE ANNOTATED CODE OF MARYLAND (1957 EDITION), TITLE "REVENUE AND TAXES", SUB-TITLE "CLASSIFICATION OF TAXES"; TO REPEAL SECTION 14 OF SAID ARTICLE, SUB-TITLE "METHOD OF ASSESSMENT," AND TO ENACT A NEW SECTION 14 TO STAND IN THE PLACE OF THE SECTION SO REPEALED; AND TO REPEAL AND RE-ENACT, WITH AMENDMENTS, SECTIONS 15 AND 23 OF SAID ARTICLE, SUB-TITLE "Method of Assessment", providing for the separate classification of real and personal property, and the sub-classification of personal property for assessment purposes; and providing further that real property shall be

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* *Italics indicate new matter added to existing law.*
[Brackets] indicate matter stricken from existing law.
CAPITALS indicate amendments to bill.
~~Strike-out~~ indicates matter stricken out of bill.

assessed at full cash value on the date of finality, and that the term full cash value as applied to real property assessments shall mean current value less an allowance for inflation; and providing further that personal property shall be assessed at full cash value on the date of finality, and that the term full cash value as applied to personal property shall mean current value without any allowance for inflation; and providing further that for the purposes of assessing stock in business, the term fair average value shall mean cost or market value, whichever is lower, without any allowance for inflation; and providing further that distilled spirits shall be valued and assessed at fair value, and that the term fair value shall mean cost or market value, whichever is lower, without any allowance for inflation; and to provide that no person, firm, or corporation shall be subject to criminal prosecution as a result of the retroactive nature of this Act.

WHEREAS, the Court of Appeals of Maryland has recently decided the case of Sears Roebuck and Company v. State Tax Commission of Maryland, docketed as No. 28 in the September Term of said Court, and reported as 136 A. 2d 567; and

WHEREAS, by the terms of said decision, the Court of Appeals has held that real property and stock in business have been classified alike by the General Assembly for assessment purposes; and that under such circumstances, the same allowance must be made for inflation in respect to stock in business as is made in respect to real property; and

WHEREAS, Article 15 of the Maryland Declaration of Rights confers upon the General Assembly the right to provide for the separate assessment of land and classification and sub-classification of personal property as it may deem proper; and

WHEREAS, it is the intention of the General Assembly to classify real property separate and distinct from personal property, and to separately sub-classify certain classes of personal property for assessment purposes, to

the end that an allowance for inflation may be made in respect to real property, but not in respect to personal property; and

WHEREAS, it is the belief of the General Assembly that the natural and inherent differences between real and personal property, and the peculiarities of certain classes of personal property require and justify separate classification and sub-classification for assessment purposes as aforesaid, and require and justify the making of an allowance for inflation in respect to real estate assessments but not in respect to personal property assessments; and

WHEREAS, the State will lose substantial revenues as the result of the Sears Roebuck decision unless remedial legislation is enacted and made retroactive to January 1, 1957; and

WHEREAS, the great majority of taxpayers have paid taxes upon stock in business without protest for the year 1957, leaving only a small number of protesting taxpayers to whom the Sears Roebuck decision will be applicable unless remedial legislation is made retroactive; ~~and~~ AND

WHEREAS, it is the belief of the General Assembly that fundamental concepts of fairness and equality require that the protesting taxpayers be accorded the same tax treatment as those taxpayers who have paid taxes upon stock in business without protest, to the end that no undue advantage will accrue to the protesting taxpayers who had not paid their taxes at the time of the filing and publication of the Sears Roebuck decision on or about November 22, 1957; ~~therefore:~~ AND

WHEREAS, IT IS THE INTENT OF THE GENERAL ASSEMBLY OF MARYLAND TO EFFECTUATE THE POLICY OF THE STATE TAX COMMISSION AND OF OTHER TAXING AUTHORITIES OF THIS STATE AS IT EXISTED PRIOR TO THE DECISION IN THE SEARS CASE, THIS POLICY BEING TO ALLOW FOR INFLATIONARY FACTORS IN THE ASSESSMENT OF REAL ESTATE BUT NOT TO ALLOW FOR SUCH INFLA-

TIONARY FACTORS IN THE ASSESSMENT OF PERSONAL PROPERTY; NOW THEREFORE

Section 1. *Be it enacted by the General Assembly of Maryland*, That, effective as of January 1, 1957, Section ~~5~~ 6 of Article 81 of the Annotated Code of Maryland (~~1951~~ 1957 Ed.), title "Revenue and Taxes", subtitle "Classification of Taxes", be and the same is hereby repealed and re-enacted, with amendments, to read as follows:

~~5.~~ 6. The taxes imposed by this Article shall be divided into (1) ordinary taxes, and (2) special taxes. Direct taxes imposed in respect of real or personal property shall be ordinary taxes; *provided, however, that real and personal property shall be separately classified, and personal property separately sub-classified for assessment purposes.* Special taxes shall include:

(a) Tax on deposits of savings banks.

(b) Gross receipts tax.

(c) Tax on commissions of executors and admintrators.

(d) Inheritance tax.

(e) Bonus tax on corporations.

(f) Tax on franchise to be a corporation.

(g) Franchise tax on foreign corporations.

(h) Income Tax.

Sec. 2. *And be it further enacted*, That, effective as of January 1, 1957, Section ~~13~~ 14 of Article 81 of the Annotated Code of Maryland (1957 ~~Supp.~~ EDITION) title "Revenue and Taxes", sub-title "Method of Assessment" be and the same is hereby repealed and that a new Sec~~tion, with three sub-sections, be and it is hereby enacted in lieu thereof, said new Section and sub-sections to be known as Section 13, sub-sections~~

~~(a), (b) and (c) to follow immediately after Section 12 of said Article, and to read as follows:~~ TION 14 BE AND THE SAME IS HEREBY ENACTED IN LIEU THEREOF, TO STAND IN THE PLACE OF THE SECTION SO REPEALED AND TO READ AS FOLLOWS:

~~13~~. 14. *(a) (Classification) Real and personal property shall be separately classified, and personal property separately sub-classified for assessment purposes. The following shall be separately sub-classfied for the purposes of personal property assessments:*

(1) Stock in business.

(2) Distilled spirits.

(3) All other personal property directed in this Article to be assessed.

(b) (Method of Assessment). Except as hereinafter provided:

(1) All real property directed in this Article to be assessed, shall be assessed at the full cash value thereof on the date of finality. The term full cash value as used in this subsection shall mean current value less an allowance for inflation, if in fact inflation exists.

(2) All personal property directed in this Article to be assessed, shall be assessed at the full cash value thereof on the date of finality. The term full cash value as used in this subsection shall mean current value without any allowance for inflation.

(3) All operating property of railroads, public utilities, and contract carriers, and all shares of stock of domestic corporations, AND NATIONAL BANKS, *the shares of which are subject to taxation by this Article, and all capital stock of foreign finance corporations directed in this Article to be assessed, shall be assessed in accordance with the provisions of*

Sections 15, 19 and 20, respectively, of this Article, subject, however, to the provisions of Section 8 hereof. To the extent that the personal property of the classes of taxpayers mentioned in this sub-section is subject to taxation by this Article, said personal property shall be assessed in accordance with the provisions of sub-section (2) hereof.

(c) Any assessment existing as of June 1, 1929, or thereafter made, shall continue in force from year to year until changed pursuant to the provisions of this Article.

Sec. 3. *And be it further enacted*, That, effective as of January 1, 1957, Sections ~~14~~ 15 and ~~22~~ 23 of Article 81 of the Annotated Code of Maryland (~~1951 Ed. and 1957 Supp.~~) (1957 EDITION), title "Revenue and Taxes", sub-title "Method of Assessment", be and the same are hereby repealed and re-enacted, with amendments, to read as follows:

~~14~~. 15. (a) The stock in business of every person, firm or corporation engaged in any manufacturing or commercial business in this State shall be valued and assessed to the owner thereof on the date of finality as its fair average value for the twelve months preceding the date of finality ((,)) . *The term fair average value as used in this Section shall mean cost or market value, whichever is lower, without any allowance for inflation.* ((but)) In the computation of the fair average value of the stock in business of registered motor vehicle dealers, the value of used motor vehicles, titled in Maryland and taken in trade by such dealers as partial payments on the purchase of other motor vehicles, shall be excluded.

(b) Provided, however, that for municipal taxation in the City of Frederick such stock in business shall be assessed at seventy-five per centum (75%) of such fair average value for the twelve months preceding the date of finality.

(c) For county taxation in Washington County the amount of fifteen hundred dollars ($1,500.00) in value of the stock in trade, or one-quarter of the value of all the stock in trade, whichever is the greater figure, shall be entirely exempt from assessment and taxation; and the remainder, if any, then shall be assessed and taxed at seventy-five per centum (75%) of such fair average value for the twelve months preceding the date of finality.

(d) For the purpose of county taxation in Allegany, Anne Arundel, Baltimore, Calvert, Caroline, Carroll, Cecil, Frederick, Garrett, Harford, Howard, Kent, Montgomery, Prince George's, Queen Anne's, Somerset, Talbot, Wicomico and Worcester counties and the City of Annapolis, such stock in business shall be assessed at sixty per centum (60%) of such fair average value for the twelve months preceding the date of finality.

(e) Provided further, however, that any person, firm or corporation who shall take advantage of the provisions of this section shall not be allowed the exemption in the percentage of the total assessed valuation which is provided by Section 8, subsection (24) of this article.

~~22~~. 23. For the purpose of the assessment and collection ((or)) *of* ordinary taxes on distilled spirits, it is hereby made the duty of each distiller, and of every owner or proprietor of a bonded or other warehouse, in which distilled spirits are stored and of every person or corporation having custody of such spirits to make report to the State Tax Commission on or before the fifteenth day of March in each and every year of all the distilled spirits on hand as of the first day of January preceding, and the tax for the ensuing year from the said first day of January shall be levied and paid on the amount of distilled spirits so in hand as representing the taxable distilled spirits for such year ((;)). *and said spirits shall be valued and as-*

sessed at fair value. The term fair value as used in this section shall mean cost or market value, whichever is lower, without any allowance for inflation. Provided, however, that the same distilled spirits shall not be taxed twice for the same year.

SEC. 4. *And be it further enacted*, That no person, firm or corporation shall be subject to criminal prosecution or criminal penalties because of any violation of the provisions of these sections which occurred prior to the passage of this Act.

SEC. 5. *And be it further enacted*, That if any one or more sections, clauses, sentences, words or parts of this Act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not effect, impair or invalidate the remaining provisions hereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause or provision of this Act in any one or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

SEC. 6. *And be it further enacted*, That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly of Maryland, the same shall take effect from the date of its passage.

Approved April 4, 1958.

APPENDIX B

Opinions Below

In the Circuit Court No. 2 of Baltimore City

National Can Corporation

vs.

Cornelius P. Mundy, Owen E. Hitchins and John Wood Logan, Constituting the State Tax Commission of Maryland.

Memorandum and Order

This is an appeal from an assessment of the personal property of National Can Corporation for the year 1957 made by the State Tax Commission of Maryland in the exercise of its original jurisdiction. It raises the question of the constitutionality of Chapter 73 of the Laws of Maryland of 1958.

The ground for this appeal is that Chapter 73 is unconstitutional and void, both in substance and to the extent that it was made to apply retroactively to the year 1957.

In *Sears, Roebuck & Co. v. State Tax Commission of Maryland*, 214 Md. 550, 136 A. 2d 567 (1957), the Court of Appeals held that under the statute then in effect real property and stock in business had been classified alike by the Maryland Legislature for assessment purposes, and therefore, since the State Tax Commission made allowances for inflation in assessing real property, it was required to make the same allowances in assessing stock in business.

Chapter 73 of the Laws of 1958 was passed as a result of the *Sears Roebuck* decision, and as the preamble to the Act recites, was intended "to effectuate the policy of

the State Tax Commission . . . as it existed prior to the decision in the Sears case."

The right of the General Assembly to provide for separate classification of real property and personal property is clearly established by the amendment of November 2, 1915, of Article 15 of the Declaration of Rights of Maryland. The history of Article 15 is set forth in 37 Op. Atty. Gen. 424 (1952). The constitutional requirement is met when there is a proper classification and uniformity within each classification. This Court finds that Chapter 73 of the Laws of Maryland, 1958, insofar as it authorizes the separate classification of real property and personal property, is valid and constitutional both under the Maryland Constitution and the Federal Constitution.

Petitioner argues separately that Chapter 73 cannot be applied retroactively to January 1, 1957, and to that extent is unconstitutional. More also, the preamble to the Act gives the reasons the Legislature made the statute retroactive. In the main, the Legislature sought to avoid a substantial loss of revenue by the State.

The leading Maryland case regarding the constitutional validity of retroactive legislation is *Comptroller v. Glenn L. Martin Co.*, 216 Md. 235 (1958). In that case, the Court of Appeals struck down a statute which sought to make amendments to the Sales and Use Tax Acts retroactively effective for a period of ten years. However, as the Court of Appeals noted, not all retroactive statutes are invalid. *Diamond Match Co. v. State Tax Commission*, 175 Md. 234, 200 A. 365. Chief Judge Brune, in his opinion in the *Martin* case, reviewed the decisions on tax statutes which were made retroactively effective. I find that Chapter 73 falls within the permissible limits of retroactive tax legislation. The factual situation in the instant case is far different from that in the *Martin* case where the Legislature attempted to tax transactions completed long before the tax was in existence.

For the above reasons, the Court finds that the assessment entered against Petitioner by the State Tax Commis-

sion is valid and correct; and it is hereby ORDERED, ADJUDGED, and DECREED by the Circuit Court No. 2 of Baltimore City, this 8th day of April, 1959, that the appeal of National Can Corporation be and it is hereby dismissed, with costs.

/s/ JOSEPH L. CARTER,

Judge.

Filed: April 8, 1959

In the Court of Appeals of Maryland

(No. 29, September Term, 1959, Advanced)

Reported in 220 Md. 418, 153 A. 2d 287

National Can Corporation

v.

State Tax Commission of Maryland
Decided July 9, 1959

Motion for stay of execution of mandate filed August 5, 1959, granted and order signed, September 1, 1959.

Appeal from Circuit Court No. 2 of Baltimore City (CARTER, J.).

Appeal by National Can Corporation to Circuit Court No. 2 of Baltimore City from a final assessment of the State Tax Commission. From an order dismissing the appeal, National Can Corporation appeals.

Order affirmed, with costs.

The cause was argued before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT and HORNEY, JJ.

BRUNE, C.J., delivered the opinion of the Court.

The appellant, National Can Company, (National) seeks to set aside the assessment for the year 1957 of its tangible personal property, consisting of furniture, fixtures and equipment, manufactured products and raw material, tools and machinery used for manufacturing, and tools and machinery not used for manufacturing. The aggregate assessed value of such property is somewhat in excess of $5,200,000, the great bulk of it being placed upon manufactured products and raw material (over $3,737,000) and tools and machinery used for manufacturing ($1,432,000). The assessments were made by the appellee, the State Tax Commission (the Commission). The case turns upon the validity of Chapter 73 of the Acts of 1958 (the Act), which the trial court upheld.

The Act begins with nine recitals: (1) a reference to the decision by this Court of the case of *Sears, Roebuck & Co. v. State Tax Commission* (214 Md. 550), 136 A. 2d 567; (2) a summary of the holding therein — that real property and stock in business have been classified alike by the General Assembly for assessment purposes and that the same allowance for inflation must be made in respect of stock in business as in respect of real property; (3) that Article 15 of the Maryland Declaration of Rights empowers the General Assembly to provide for the separate assessment of land and the classification and sub-classification of personal property; (4) that "it is the intention of the General Assembly to classify real property separate and distinct from personal property, and to separately sub-classify certain classes of personal property for assessment purposes, to the end that an allowance for inflation may be made in respect to real property, but not in respect to personal property;" (5) that "it is the belief of the General Assembly that the natural and inherent differences between real and personal property, and the peculiarities of certain classes of personal property require and justify separate classification and sub-classification for assessment purposes as aforesaid, and require and justify the making of an allowance for inflation in respect to real estate assessments but not in respect to personal property assessments;" (6) that "the State will lose substantial revenues as the

result of the Sears Roebuck decision unless remedial legislation is enacted and made retroactive to January 1, 1957;" (7) that "the great majority of taxpayers have paid taxes upon stock in business without protest for the year 1957, leaving only a small number of protesting taxpayers to whom the Sears Roebuck decision will be applicable unless remedial legislation is made retroactive;" (8) that "it is the belief of the General Assembly that fundamental concepts of fairness and equality require that the protesting taxpayers be accorded the same tax treatment as those taxpayers who have paid taxes upon stock in business without protest, to the end that no undue advantage will accrue to the protesting taxpayers who had not paid their taxes at the time of the filing and publication of the Sears Roebuck decision on or about November 22, 1957;" and (9) that "it is the intent of the General Assembly of Maryland to effectuate the policy of the State Tax Commission and of other taxing authorities of this State as it existed prior to the decision in the Sears case, this policy being to allow for inflationary factors in the assessment of real estate but not to allow for such inflationary factors in the assessment of personal property".

The operative provisions of the Act undertake to carry into effect the purposes and intent of the General Assembly as expressed in the above preamble clauses numbered (4) to (9), inclusive. Accordingly, the Act, insofar as here pertinent, amends or adds to the pre-existing law by providing, in brief, "effective as of January 1, 1957": (a) for the separate classification for taxation of real and personal property, with a separate sub-classification under the latter of "stock in business" (inventory); (b) for the determination of the "full cash value" of real estate by deducting from its "current value * * * an allowance for inflation, if in fact inflation exists"; (c) for the determination of the full cash value of personal property, as its "current value without any allowance for inflation"; (d) for the determination of the "fair average value" of a "stock in business" by taking the "cost or market value [thereof], whichever is lower, without any allowance for inflation"; (e)

for immunity from prosecution or penalty for any violation of the Act which occurred prior to its passage; and (f) for the separability of the provisions of the Act. The Act was passed as an emergency measure to take effect from the date of its passage, and it was approved on April 4, 1958. It was clearly intended to reverse the result of the *Sears* case for 1957 and subsequent years.

This case is a sequel to the *Sears* case, *supra*, 214 Md. 550, 136 A. 2d 567. There this Court held that, under the then existing law, the assessment practice of the State Tax Commission of making a deduction from the "full cash value" of real estate in order to allow for the effect of inflation, but of refusing to make any such deduction from the "full cash value" of personal property (consisting of stock in trade) constituted a discrimination against the owner of such personal property, from which the owner was entitled to relief by having his assessment reduced. At the times of the assessments involved in the *Sears* case Code (1957), Art. 81, Sec. 14[1], provided (in part) that, "[e]xcept as hereinafter provided, all property directed in this article to be assessed, shall be assessed at the full cash value thereof on the date of finality." A special method of determining the fair cash value of the stock in trade of persons engaged in manufacturing or commercial business was prescribed by Sec. 15 (Sec. 14 in 1951). This was based upon the average value of inventory for the twelve months preceding the date of finality.

Before proceeding further it seems well to state that the *Sears* case did not determine that Article 15 of the Maryland Declaration of Rights required uniformity of treatment of real estate and personal property for tax purposes. No such question was involved in the case. It was there held that under the applicable statutory provisions the Legislature had put real estate and inventories on the same

[1] References to section numbers in this opinion are to those of the 1957 Edition of the Code, or amendments thereto; and, unless otherwise specified, references simply to section numbers are to sections of Art. 81 of the Code. Sec. 14 of the 1957 Edition was Sec. 13 (a) of the 1951 Edition.

footing for tax purposes, and that a practice of the Commission which gave to the former more favorable treatment than to the latter as to assessments and therefore (because the tax rates per dollar of assessed value were the same) also gave to owners of real estate more favorable treatment as to the amount of taxes on property of equal value, was invalid. It was further held that under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, the owner of personal property was entitled to have his assessment reduced to the same level as that applicable to real estate.

The challenges to the validity of the Act are based upon the following grounds: first, that it sets up an unfair and discriminatory basis for the assessment of real and personal property, which (a) is not authorized by the provisions for classification of property contained in Article 15 of the Maryland Declaration of Rights and which (b) is prohibited by the Fourteenth Amendment to the Constitution of the United States; second, that it is an invalid attempt to delegate legislative power to the Commission, since it sets up no standards whatever by which the Commission is to be guided in making an allowance for inflation in assessing real estate and thereby nullifies the sole basis ordered for differentiation between real and personal property; and third, that its retroactive provisions are unconstitutional as a violation of due process under Article 23 of the Maryland Declaration of Rights and under the Fourteenth Amendment to the Constitution of the United States.

The first attack is two-pronged, but its two branches are so closely related as to make it desirable to treat them together so as to avoid unnecessary repetition.

The power to classify property for purposes of taxation was conferred by the amendment to Article 15 of the Maryland Declaration of Rights which was proposed by Ch. 390 of the Acts of 1914 and ratified November 2, 1915. Prior to that amendment, taxes were required under Article 15 to be apportioned in accordance with the actual

worth of the taxpayer in real or personal property. This necessarily meant uniformity of assessment as well as uniformity of tax rates. See an article by H. H. Walker Lewis, Esq., "Maryland Tax Articles," 13 Maryland L. Rev. 83, at 105; *State v. Cumberland & Penn. R.R. Co.*, 40 Md. 22; *Schley v. Montgomery County*, 106 Md. 407, 67 A. 250. The history of Article 15 is traced by Lewis and is also traced in a very full opinion of the then Attorney General, now Judge Hammond, and of Robert M. Thomas, Esq., then an Assistant Attorney General, reported in 37 Ops. Att'y Gen. 424 (1952). See especially pages 426-433 and the cases therein cited. We shall not undertake to review this history at length in this opinion.

In the Constitution of 1867, as originally adopted, Article 15 contained a provision that "every person in the State, or person holding property therein, ought to contribute his proportion of public taxes, for the support of the government, according to his actual worth in real or personal property". This was omitted by the 1915 amendment, which substituted the provision "that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and subclassifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or subclass of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy". The Article still concludes with the provision "yet fines, duties or taxes may justly be imposed, or laid with a political view for the good government and benefit of the community." This last clause is not involved in the present case.

Susquehanna Power Co. v. State Tax Comm., 159 Md. 334, 151 A. 29, makes it clear that the obligation of owners of property within the State to pay taxes thereon continues to exist, notwithstanding the amendment, and is implicit

in the provisions with regard to uniformity within classes or subclasses. We find, however, no implication in that case of a continued constitutional obligation under Article 15 that taxes must be uniform as between different classes of property. Cf. *Wells v. Hyattsville*, 77 Md. 125, 26 A. 357, decided in 1893, in which it was held that a local Act imposing a tax on real estate, but barring a tax on personal property, for town purposes was unconstitutional under Article 15 as it then stood.

In *Oursler v. Tawes*, 178 Md. 471, 13 A. 2d 763, this Court held that Article 15 did not bar income taxes at different rates on ordinary income and on investment income. This case is of especial significance here because, although the Court considered it doubtful whether an income tax was a property tax, it was held that it was controlled by the same basic principles which govern either excise or property taxation. (178 Md. 482.) In rejecting the taxpayers' argument based upon alleged unwarranted discrimination this Court said (178 Md. 484-485): "In some cases, it is submitted that sources of income accruing from property of one classification are subjected to a greater tax burden than are sources of income derived from property pertaining to another and separate classification. And it is argued that for that reason the effect of the act is to impose an arbitrary and discriminatory tax upon some taxpayers as compared with the tax burden which it places upon others. This situation, however, arises not as between taxpayers whose sources of income or situations are similar in that they accrue from property of like classification under the act; but arises in cases where the sources of income accrue from property of separate and distinct classifications under the act." This seems to be a clear indication that taxes can be different as between different classes of property.

See also *County Comm'rs of Anne Arundel County v. English*, 182 Md. 514, 35 A. 2d 135, which recognized that there can be a reasonable classification for tax purposes, but struck down the assessment there involved as being discriminatory.

1 Cooley, *Taxation*, (4th Ed.), § 281, p. 596, states: "* * * [I]n those states where all property need not be taxed, a classification of property as real and personal, and the taxing of one and not the other, has been upheld." Maryland has long granted or permitted exemptions in favor of religious or charitable organizations and other exemptions believed to be in the public interest, such as those from local or State taxation, or both, of raw materials and inventory in the hands of manufacturers and manufacturing machinery and equipment. Indeed, it was the repeal of such exemptions in Baltimore City which precipitated the present controversy. Cf. *Kimball-Tyler Co. v. City of Baltimore*, 214 Md. 86, 133 A. 2d 433. National was a party to a suit covered by that case.

In footnote 25 to § 292, *op. cit.*, Cooley says: "If there is a general power to classify, no good reason is apparent why different rates may not be imposed on real and personal property as constituting separate classes." See *Klein v. Bd. of Supervisors*, 282 U.S. 19, 24; *Waring v. City of Savannah*, 60 Ga. 93, 98; *Wadhams & Co. v. State Tax Comm.*, 273 P. 2d 440 (Ore.); *Hilger v. Moore*, 182 P. 477 (Mont.).

A like rule has been applied to variations in assessments of different classes of property. *Rees v. City of Erie*, 90 A. 58 (Pa.), involving different percentages applied to land and to improvements. *Kentucky Finance Co. v. McCord*, 290 S.W. 2d 481 (Ky.), 100% of full cash value on intangible personal property, 29.7% on real estate.

In Maryland, a totally different basis of taxation of intangible personal property long prevailed — the so-called 30-mill tax on stocks, bonds and other securities. Its repeal and replacement by the income tax on investment income shows the interrelation which may exist between property taxes and income taxes.[2]

[2] Former Judge Oscar Leser, for many years a member of the Appeal Tax Court of Baltimore and, later of the State Tax Commission, has stated that prior to the 1915 amendment of Article 15 the 30-mill tax was unconstitutional, though it was never challenged. See Lewis, *op. cit.*, 13 Md. L. Rev. 100, citing Proceedings of National Tax Assn., 1922, p. 307. Exemptions in favor of manufacturers long antedate the 1915 amendment.

The Attorney General's opinion above referred to (37 Ops. Att'y Gen. 424) dealt directly with a statute which provided for the assessment of inventories in two counties for local purposes at 75% of the fair average value thereof during the year preceding the date of finality. In discussing the question, the opinion (p. 434) referred to 1 Cooley, *op. cit.*, § 298 and quoted a footnote stating that "Ordinarily, it would seem, a classification whereby one class of property would be valued at a higher or lower percentage of real value than other property, conceding the power to classify in a proper case, would ordinarily be an unreasonable classification and therefore invalid." The Attorney General commented: "This is almost the equivalent of saying the power does not exist." We agree with this comment. At page 436 of the above opinion, the Attorney General made the following further comment, with which we also agree:

> "Moreover, inasmuch as the final tax is the product of the rate and an assessment of valuation, there would seem to be little logic from the standpoint of practical results in denying the Legislature the power to classify for purposes of valuation and assessment when it already has the power to classify as to rates. The trend, such as it is, seems to be toward increased powers of classification for all purposes, particularly where the Constitution requires uniformity only within the class or sub-class of property."

We, therefore, find it unnecessary to rest our decision with regard to the power of the General Assembly to classify upon the narrow ground of the statement in *Rogan v. County Commissioners of Calvert County*, 194 Md. 299, 309, 71 A. 2d 47, 51 (which cited a similar statement in *Leser v. Lowenstein*, 129 Md. 244, 250, 98 A. 712), to the effect that the requirement of Article 15 that taxes shall be uniform as to land within the taxing district, "refers to levies of taxes and not to assessments." The test which we deem appropriate is the reasonableness of the classification rather than the method by which a difference in the

amount of taxes is effected — whether by a difference in percentage of assessment or by a difference in the rate of taxation applicable to the respective classes. Cf. Lewis, *op. cit.*, 13 Md. L. Rev. 103-107, where he questions the statement as made in the *Rogan* case on the ground that it has been lifted out of the context in which it was made in the *Leser* case and was thereby given a destructive effect as to the uniformity which should be required.

Our present Article 15 requires that a classification be uniform within a class, and this Court struck down as arbitrary a classification under our Income Tax Law in *Blaustein v. Tax Comm.*, 176 Md. 423, 4 A. 2d 861, where there was no real difference between income from certain trust estates which was taxed and income from others which was not.

Turning now to the Equal Protection Clause of the Fourteenth Amendment, it is well settled that this Clause does not prevent a State from making a reasonable classification for tax purposes and taxing different classes differently. *Michigan Central R.R. Co. v. Powers*, 201 U.S. 245; *Kentucky Union Co. v. Kentucky*, 219 U.S. 140; *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U.S. 132; *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362; 1 Cooley, *Taxation*, (4th Ed.), § 332, p. 705.

In the very recent case of *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the Supreme Court has reviewed many cases dealing with classification for purposes of state taxation of several kinds and has restated some of the rules with regard to the application thereto of the Equal Protection Clause of the Fourteenth Amendment. The Court points out that this clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." (358 U.S. at page 526.) The Court further says (p. 527): "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary.

The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' [Cases cited.] 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573; *State Board of Tax Comm'rs v. Jackson*, 283 U.S. 527, 537. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89; *Stebbins v. Riley*, 268 U.S. 137, 142."

The *Brown-Forman* case upheld a tax on distillers and rectifiers of blended spirits, though the state imposed no corresponding tax on distillers or rectifiers of straight spirits. In the *Jackson* case a progressive tax on chain stores based upon the number of units was upheld. In the *American Sugar Refining* case a tax on persons or corporations engaged in the business of refining sugar and molasses was upheld, notwithstanding an exemption in favor of planters and farmers grinding and refining their own sugar and molasses. In *Stebbins v. Riley, supra*, a state inheritance tax was upheld which prohibited the deduction of the amount of the Federal Estate Tax in arriving at the amount of the state tax, even though such disallowance resulted in equalities in some instances.

Equality within a class is essential under the Equal Protection Clause, but equality between different classes is not required. *Kentucky Railroad Tax Cases*, 115 U.S. 321, *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283; *Michigan Central R.R. Co. v. Powers, supra; Hart Refineries v. Harmon*, 278 U.S. 499.

The Supreme Court has also said that the Equal Protection Clause does not require that a state tax all pursuits or all property that may legitimately be taxed. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 562. That Court

has held that if a state taxes wholesale dealers in certain specified articles, it need not impose a like occupation tax upon wholesale dealers in other articles. *Southwestern Oil Co. v. Texas*, 217 U.S. 114.

Our next problem is whether or not, under established rules, the particular classification here made is valid under Article 15 of the Maryland Declaration of Rights and under the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court has repeatedly stated that under the Equal Protection Clause real property and personal property may be differently taxed. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237; *Home Ins. Co. v. New York*, 134 U.S. 594, 606; *American Sugar Refining Co. v. Louisiana*, *supra*; *Southwestern Oil Co. v. Texas*, *supra*; *Stebbins v. Riley*, *supra*; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 149. In none of these cases was this the actual holding of the case, but the general principle appears from these numerous statements to be fully accepted as well settled law. See also, 1 Cooley, *Taxation*, § 281, above cited, as to taxation of one class of property and not the other; 51 Am. Jur., *Taxation*, § 194; 84 C.J.S., *Taxation*, § 26; *Kentucky Finance Co. v. McCord*, *supra*.

These authorities are, we think, sufficient to sustain different treatment of real and personal property for purposes of assessment for taxation. We shall not, however, rest our decision on this phase of the case solely on that general ground.

We have already set forth the declarations of the Legislature in the preambles to the Act. Those numbered above as (4), (5) and (9) seem of particular pertinence in this aspect of the case, and the operative provisions of the Act are in accord with the intent and belief therein set forth. It is not incumbent upon the Legislature to state its reasons, motives or policies for adopting a tax classification (*Southwestern Oil Co. v. Texas*, *supra*; *Allied Stores of Ohio v. Bowers*, *supra*), insofar as the Equal Protection Clause is concerned; but if it does so, State action may be tested solely on the basis of the purpose declared. *Wheel-*

ing Steel Corp. v. Glander, 337 U.S. 562, commented upon and distinguished in the *Allied Stores* case.

The preamble of the Act (Par. (5)) speaks of the inherent differences between real and personal property and the peculiarities of certain classes of personal property (first) as requiring and justifying separate classification and sub-classification for assessment purposes and (second) as requiring and justifying the making of an allowance for inflation with respect to real estate, but not personal property. Other recitals show, we think, that inflation at least prompted the adoption of the statute. Yet, after we give careful consideration to that fact, and if we accept the appellant's contention that there must be some difference in the impact of inflation as between real estate and tangible personal property to support the difference in treatment here accorded, we cannot say that the legislative classification based upon the finding stated in preamble clause (5), *supra*, is unsustainable. There is a strong presumption in favor of the validity of a legislative finding. As was said by Chief Judge Markell, speaking for this Court in *Dundalk Liquor Co. v. Taiwes*, 201 Md. 58, 62, 92 A. 2d 560: "An invalid act cannot be made valid by a 'preface of generalities' in the form of a legislative declaration of purpose. *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 537, 55 S. Ct. 837, 79 L. Ed. 1570. But if a legislative declaration is not demonstrably untrue or meaningless, and if true, would support the validity of the act, the courts must accept the judgment of the legislature and cannot substitute a contrary judgment of their own." See also *Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine, etc., Insurance Co.*, 111 Md. 561, 75 A. 105.

It is true that in the *Sears* case, this Court recognized what was not, indeed, contested, that inflation had affected sales prices of real estate as well as of inventories. That, however, is not an end of the matter for the impact may be, and, in effect, has been declared by the Legislature to be, different as between real property and personal property. Only a relatively small portion of the total amount

of real property is, we believe, in the nature of the stock in trade of developers or real estate dealers, and only a relatively small portion is used for the purpose of manufacturing goods for sale, which goods are themselves directly affected by inflationary prices. Most real estate is not held for sale or for manufacturing purposes. Perhaps it would be desirable to classify properties so held separately from, say, residential real estate not held for sale. But to say that there is no difference, so far as the impact of inflation is concerned, between real estate in general, on the one hand, and tangible personal property consisting of inventory and tools and machinery used for manufacturing, on the other hand, would be to make the tail wag the dog. So to hold would, we think, amount to a substitution of the judgment of this Court for that of the Legislature, without any adequate evidence to show that the classification made by the Legislature was without any reasonable foundation. The burden rests upon one attacking the constitutionality of an Act to show such lack. *Salsburg v. State*, 201 Md. 212, 94 A. 2d 280, affd. 346 U.S. 545; *Allied American Mutual Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 150 A. 2d 421; *Dundalk Liquor Co. v. Tawes, supra; Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine, etc., Insurance Co., supra; Robey v. Broersma*, 181 Md. 325, 329, 26 A. 2d 820; *Tatlebaum v. Pantex Mfg. Co.*, 204 Md. 360, 370, 104 A. 2d 813.

As to the relative impact of inflation upon real property and tangible personal property, we may note that under our present tax laws and exemptions from taxation (as to the latter of which see Secs. 9 (12) and 9 (17) of Art. 81), generally speaking, taxable personal property is held or used for manufacturing, mercantile or other business purposes. As we have noted above, real estate, to a very considerable extent, is not. Inventories are held for sale or resale in the hope and expectation of a quick turnover. By reason of the limitation of the assessable value of inventories under Sec. 15 (a) to cost or market, whichever is lower, the owner is ordinarily protected taxwise against any inflationary rise in prices after he has become the

owner of the property. No corresponding protection is built into the statute for other types of tangible personal property, but even such other types of property are usually held for a considerably shorter time than real estate, because they wear out or become obsolete more rapidly. They are generally subject to fairly rapid rates of depreciation under income tax laws as compared with improvements to real estate, and land is not subject to depreciation at all in an accounting sense. Of course, depreciation allowances give a tax benefit under income tax laws. In the overall picture of taxation the owner of tangible personal property held for business purposes thus receives a greater deduction in any given year from gross income in arriving at his net income subject to taxation than does the owner of real property of equal original value.

Even though the owner of tangible personal property held for business purposes may fare worse taxwise than the owner of real estate, this alone does not nullify a classification based upon the two different types of property. Insofar as our Article 15 of the Declaration of Rights is concerned, as we have already pointed out, there would seem to be little point in providing for different classifications of property if different tax treatment could not be accorded to the actually different classes. Insofar as the question of discrimination and the Fourteenth Amendment is concerned, *Allied Stores of Ohio v. Bowers, supra*, seems decisive. There the Court said (358 U.S. at 528), as we have already noted, that the fact that "a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy", and further that "a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." The similarity of the problem of reasonable classification under a state constitution like our Article 15 and under the Equal Protection Clause of the Fourteenth Amendment is apparent

and was noted in *State Board of Tax Comm'rs v. Jackson*, *supra*, 283 U.S. at 542.

In the present case we think, as we have indicated above, that a state of facts can reasonably be conceived which would support the classification, and we, therefore find no violation of either Article 15 of the Maryland Declaration of Rights or of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

We turn now to National's contention that the absence of standards to guide the Commission in making an allowance for inflation is fatal to the validity of the Act. The language of the Act requiring that an allowance for inflation be made in the case of real estate is certainly very general in terms. However, the Act refers in its preambles to the *Sears* case and to the prior assessing practices of the Commission and of other taxing authorities with regard to making an allowance for inflation in the case of real estate and not making it in the case of personal property. That such a practice existed was recognized in the *Sears* case[3] and that it was sufficiently definite to be capable of ascertainment, at least for the year 1957, was implicit in the remand of the case for further proceedings which were to be for the purpose of reducing Sears' inventory assessment to the same level as that of real estate. Such reduction was the point to which *Hillsborough Township v. Cromwell*, 326 U.S. 620, was cited in the *Sears* case. The evidence in this case indicates that the usual deduction which had been allowed for inflation in the case of real estate was approximately 40%. It is to be presumed that the General Assembly was familiar with this practice when it stated its intention to effectuate the policy of the Commission and of other taxing authorities and adopted an enactment to carry that intention into effect.

[3] Some practice involving assessment of real estate at less than full current value has been used by the Commission in the past. See *Rogan v. Co. Comm'rs*, *supra*. And a hybrid system of valuing improvements to real estate, based upon age, was upheld in *State Tax Comm'r v. Brandt Cabinet Works*, 202 Md. 533, 97 A. 2d 290.

We find it unnecessary, however, to pass upon any question based upon the vagueness of the statute as regards real estate. If we assume, without deciding, that the absence or vagueness of the standards set up renders the provision for such an allowance invalid, we think that the separability clause would come into operation. This would leave the provision for taxation of personal property at full cash value in full force and effect. The appellant contends that since the provision for allowing a deduction in real estate assessments on account of inflation must fall, then, giving effect to the separability clause, real estate is (still) assessable at full cash value, and we are back at the same place as in the *Sears* case.

We do not think that this result follows. On the contrary, we think that a reading of the whole Act, including the preambles, indicates that the General Assembly intended to exercise its power of classification as one objective in itself, and that this is true, notwithstanding that inflationary influences affecting real estate and the decision in the *Sears* case doubtless prompted its action. It seems clear that the Legislature intended to tax personal property at full value, just as it intended to tax real property at less. There seems little reason why the possible failure of the latter objective because of inadequate guides as to how to effect it, should defeat the former. There is no room to infer that the Legislature intended to treat both alike. Here the Legislature could hardly have made it plainer that it intended to classify real estate and personal property separately for tax purposes and to treat them differently. An intention to treat them alike was the foundation of the *Sears* decision; under the present Act that intention no longer exists.

In the light of what we have just said, if we assume that the provision for an allowance on account of inflation for real estate is invalid for vagueness or lack of standards, we cannot say that the General Assembly would not have adopted the Act at all, and specifically the provisions for classification, if it had known that this provision would be stricken down; nor can we say that it is so interwoven

with the entire Act that the provisions for different classification cannot stand without it. Therefore, we think that the provisions as to personal property should stand and the separability clause and the presumption which it creates should be given effect. *Fidelity & Guaranty Fire Corp. v. State Tax Comm.*, 172 Md. 652, 193 A. 164; *Oursler v. Tawes, supra*; *Md. Unemployment Comp. Bd. v. Albrecht*, 183 Md. 87, 36 A. 2d 666. See also *Bd. of Co. Comm'rs of Prince George's Co. v. Donohoe* (No. 257, Sept. Term, 1958), 220 Md. 362, 152 A. 2d 555. Cf. *Heubeck v. City of Baltimore*, 205 Md. 203, 107 A. 2d 99; *City of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 289-290, 145 A. 2d 111.

Accordingly, we should no longer have a difference *within the same class* as between National, a personal property taxpayer, and real estate taxpayers; but any inequality which there may be is between different classes. As we have held above, real property and personal property may be differently classified and taxed, without any requirement for equality between them. Accordingly, we think, National is in no position to complain.

There is no obligation resting on the State under the Fourteenth Amendment to tax other classes. See *Connolly v. Union Sewer Pipe Co.*; *Southwestern Oil Co. v. Texas*, both cited above, and the cases upholding different taxation of different classes of property. See also *Charleston Federal Savings & Loan Assoc. v. Alderson*, 324 U.S. 182, 191, in which it is said that the Equal Protection Clause does not prohibit inequality in taxation "which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxed property *in a single class*." (Italics supplied.)

Any invalidity of the inflation allowance provisions affecting real estate of which a real property taxpayer might complain because of alleged inequality of assessments does not give a taxpayer not affected by the provisions complained of standing to maintain a suit to upset them. *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54; *Seaboard Commercial Corp. v. State Tax Comm.*, 181 Md. 234, 239, 29 A. 2d 294; *Atkinson v. Sapperstein*, 191 Md. 301,

309, 60 A. 2d 737; *Hess v. Mullaney*, 213 F. 2d 635; *People v. Southwestern Bell Tel. Co.*, 36 N.E. 2d 362 (Ill. Sup. Ct). In the last mentioned case, it was held that there was no violation of uniformity of taxation where the assessment of one kind of property (real estate) was reduced and that of another (personal property) was not.

The appellant's last contention is that the Act is invalid as applied to 1957 assessments because, as to them, it is retroactive.

The subject of retroactive taxes was considered at some length in *Comptroller v. Martin*, 216 Md. 235, 140 A. 2d 288, in which retroactive sales and use taxes having a backward reach of three to six years as to the transactions there involved was held invalid. That case, however, recognized the often stated rule that a tax is not necessarily invalid because it is retroactive, citing *Diamond Match Co. v. State Tax Comm.*, 175 Md. 234, 200 A. 365; *Leser v. Wagner*, 120 Md. 671, 87 A. 1040, affd. *sub nom. Wagner v. Baltimore*, 239 U.S. 207; and *Welch v. Henry*, 305 U.S. 134.

The first general group of cases discussed in the *Martin* case in which retroactive taxes have been upheld are the so-called ratification cases. Probably the leading case among them is *United States v. Heinszen & Co.*, 206 U.S. 370. In speaking of this case, we there said: "It upheld an Act of Congress which validated customs duties previously imposed under Presidential, rather than Congressional, authority. Other Supreme Court decisions had established the lack of power to impose such duties without the authorization of Congress. The case was rested squarely upon ratification of the acts of an agent done without prior authority from the principal. The *Heinszen* case was followed in *Tiaco v. Forbes*, 228 U.S. 549, and in *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226. In *Tiaco v. Forbes*, 228 U.S. at 556, Mr. Justice Holmes thus stated the ratification doctrine: '[I]t generally is recognized that * * * where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act. The

person who has assumed to represent the will and person of the superior power is given the benefit of the representation if it turns out that his assumption was correct. [Cases cited.]' "

At this point it seems appropriate to state that the Act is not, in our estimation, an attempt at a legislative reversal of a judicial decision. It is, rather, an attempt to supply legislative authority previously lacking. See *Washington Suburban Sanitary Commission v. Noel*, 155 Md. 427, 142 A. 634, where the Legislature ratified an assessment for a public improvement which had previously been held invalid because of a lack of the notice required by the act originally authorizing the assessment.

The *Noel* case is clearly a case of ratification. So, we think, is the present case. In the *Martin* case, the preambles of the statute (which, as noted, did not constitute parts of its operative provisions) undertook to declare what the intent of the General Assembly had "always" been as to certain definitions and that the uniform administrative interpretation and enforcement had always been in conformity "with the provisions of this Act." It was pointed out that these recitals did not amount to a legislative attempt to reverse prior decisions of this Court contrary to these declarations, that if it were such an attempt it would be ineffectual (citing Article 8 of the Declaration of Rights; *Crane v. Meginnis*, 1 Gill & J. 463, 476; and other cases), and that the pertinent operative parts of the statute there involved did not undertake to ratify anything, but to add retroactively a new definition to the Retail Sales Tax Act and (similarly) to amend a provision of the Use Tax Act. These changes, which had the effect of bringing transactions not previously taxed within the ambit of taxation, were held to constitute new enactments, not ratification (216 Md. 245, 249).

In the instant case the intention to ratify is clear, even though the word "ratify" is not used, and the words of the operative portion of the statute are apt to accomplish that purpose. It is true, as held in the *Martin* case and in *Gibson v. State*, 204 Md. 423, 104 A. 2d 800, that a preamble is not

an operative part of a statute. It may, however, sometimes be resorted to in aid of the interpretation of a statute. *Hammond v. Lancaster*, 194 Md. 462, 71 A. 2d 474; *Hammond v. Frankfeld*, 194 Md. 487, 71 A. 2d 482. An existing practice as to the assessment of property long taxed was recognized and was adopted retroactively by the enactment in the case before us.

In one respect the case is stronger for ratification than was the *Heinszen* case. This is that there was here a statute in force which authorized the taxation of the property in question, but in *Heinszen* there was not. The difficulty in *Sears* stemmed from an administrative practice which was contrary to the requirements of the statute; but, even so, *some* assessment was proper. This, we think, is clear from the decision in Sears to remand for the reduction of the assessment; otherwise the tax would have been held wholly invalid.

The ratification here involved is, we think, indistinguishable in principle from that upheld in the *Noel* case. It also seems to be supported by *Leonardo v. Board of County Comm'rs of St. Mary's County*, 214 Md. 287, 134 A. 2d 284, where the General Assembly ratified an invalid statute providing for the establishment of a special taxing district for erosion prevention work, though there had been no levy of taxes prior to the validating act.

National contends that no retroactive *ad valorem* tax has ever been upheld. The Commission controverts this and cites a number of cases in support of its position. Among the cases so cited we find *Chicago, R. I. & P. Ry. Co. v. Streepy*, 211 Iowa 1334, 236 N.W. 24, and *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401, quite in point. In each the state legislature passed a retroactive, curative act for the imposition of ordinary real estate taxes, which, we take it, were *ad valorem* taxes. In the Iowa case the original statute was held unconstitutional because of a defect in the title; in the Virginia case the original statute was held unconstitutional because it had not received the requisite majority of votes needed for an act of its type in the legislature.

We see nothing peculiar to an *ad valorem* tax which would call for the application of a different rule from that applicable to some other types of retroactive taxes, such as benefit assessments.

As was said in the *Streepy* case: "As to the contention that the Legislature had no power to pass a retroactive legalizing act, the law is that, if the Legislature possessed the power in the first place to authorize the levy and collection of the taxes in question, then it had the power, by retrospective act, to cure any defect which may have obtained in the assessment and collection of such a tax."

In the *Whitlock* case the Supreme Court of Appeals of Virginia said: "It is not claimed that there is any inhibition in the Constitution of the State of Virginia upon the passage of retrospective laws by the Legislature. The authorities we have cited abundantly show that such laws are not repugnant to the Constitution of the United States, unless they partake of the nature of *ex post facto* laws, or impair the obligation of a contract; or, since the adoption of the Fourteenth Amendment, deprive a citizen of property without due process of law.

"From these propositions a fourth qualification is deduced, which is really a corollary from them, and that is, that the curative act can only be effectual to do that which the Legislature would have been competent to provide for and require to be done by a law prospective in its operation."

We think that the Act in this case meets the tests stated in the *Whitlock* case.

A tax on imports is in at least one sense an *ad valorem* tax, though it is not a general property tax. Hence, the *Heinszen* case also seems to be against the appellant's contention that a retroactive *ad valorem* tax cannot be valid.

Other cases cited by the appellee which tend to support its contention on this point are: *Kentucky Union Co. v. Kentucky*, *supra*; *Rafferty v. Smith, Bell & Co.*, *supra* (tax on value of exports); *Wooley v. Hendrickson*, 73

N.J.L. 14, 62 A. 278 (validation of taxes for school purposes); *People v. New York Central R.R. Co.*, 282 Ill. 11, 118 N.E. 462 (curative act in 1917 to validate 1916 levy for schools); *Ricardo v. Ambrose*, 211 F. 2d 212 (C.A., 3rd).

In the *Kentucky Union* case retroactive real estate taxes for the years 1901 to 1905, inclusive, were imposed by a Kentucky statute passed in 1906. It was held, citing *League v. Texas*, 184 U.S. 156, that "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not forbidden by the Federal Constitution." (219 U.S. 152-153.)

The fact that the appellant had instituted suit to have its assessment declared invalid prior to the time of adoption of the curative statute does not give it any vested right. *United States v. Heinszen & Co., supra; Mattingly v. District of Columbia*, 97 U.S. 687; *Chicago, R. I. & P. Ry. Co. v. Streepy, supra*, 211 Iowa at 1342.

In view of our holding that this case is one of ratification, the "recent transactions" rule referred to in the *Martin* case does not seem of importance, if it is, indeed, applicable at all; nor do we find any violation of it. Perhaps the most stringent statement of that rule is to be found in *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A. 2d 563, where it was said (108 A. 2d 569) that: "Following *Welch v. Henry*, we decide that a tax may not be retroactively applied beyond the year of the general legislative session *immediately preceding that of its enactment*; to provide otherwise constitutes a denial of due process." *Wheeler v. Commissioner of Internal Revenue*, 143 F. 2d 162 (C.C.A., 9th), reversed on other grounds, 324 U.S. 542, adopts the same view of *Welch v. Henry* as did the *Budd* case. *Welch v. Henry, supra*, 305 U.S. 134, does not, however, impose such a limitation; it merely upheld a tax not exceeding it. Here the date of finality was January 1, 1957, (*Kimball-Tyler Co. v. City of Baltimore, supra*), which would fall even within the rule of the *Budd* case, though we do not hold here, any more than we did in the *Martin* case, that that case expresses the uttermost limit of retroactivity of a tax statute under the recent transactions rule.

In accordance with the above views, the order of the trial court will be affirmed.

Order affirmed, with costs.

HENDERSON, J., filed the following dissenting opinion.

The majority opinion properly observes that this case is a sequel to the case of *Sears, Roebuck v. State Tax Comm.*, 214 Md. 550. It was there held that an assessment practice of the Tax Commission, which gave more favorable treatment to the owners of real property than to the owners of personal property, was invalid, and that an owner of personal property had standing, under the equal protection clause of the Fourteenth Amendment, to raise the question of discrimination, citing *Hillsborough Township v. Cromwell*, 326 U.S. 620. Moreover, this Court held the taxpayer was entitled to have its assessment reduced to the lower level accorded to others, although in earlier cases it had been indicated that its only remedy would be to require the taxing authorities to raise the level of the assessments of others. To this extent, it would seem that this Court felt constrained in the *Sears* case to modify or reverse the rule laid down in *Baltimore Steam Packet Co. v. Baltimore*, 161 Md. 9, 21. See also *Board of County Comm'rs of A. A. Co. v. Buch*, 190 Md. 394, 399. For a discussion of the effect of the *Hillsborough* case, see Hellerstein, *Judicial Review of Property Tax Assessments*, 14 *Tax L. Rev.*, 327, 344 *et seq.*, citing particularly the case of *Baldwin Construction Co. v. Essex County Bd. of Tax.*, 108 A. 2d 598 (N.J., 1954), which drastically altered the assessment procedures in New Jersey.

The State Tax Commission was then faced with the alternatives of either raising all assessments to the level of full cash value prescribed by the statute, or reducing the assessments of personal property. It did neither. Instead, it sought legislative approval of its prior practice in the guise of classification. The question presented is whether the statute validly accomplishes its avowed purpose, declared in a recital to be "to effectuate the policy of the

State Tax Commission and of other taxing authorities of this State as it existed prior to the decision in the *Sears* case, this policy being to allow for inflationary factors in the assessment of real property but not to allow for such inflationary factors in the assessment of personal property." A recital is not law, although it may be looked to as bearing upon legislative intent. The key language of the enactment is found in subsection 14(b)(1) which defines "full cash value", as applied to real estate, as "current value less an allowance for inflation, if in fact inflation exists". Subsection 14(b)(2) defines "full cash value", as applied to personal property, as "current value without any allowance for inflation".

I would agree that the present Article 15 of our Declaration of Rights does not require that there be uniformity in the tax rates applicable to the various classes of property therein mentioned. For present purposes I may assume that the legislature itself may validly accord to some kinds of property exemptions or deductions not accorded to property in another class or subclass. Statutes in some states which themselves fix the percentage of assessment values have been sustained, when uniform as to class, and where state constitutions permit. But the majority opinion does not attempt to meet the objection, raised on this appeal, that the vague and general reference to "inflation" is an invalid delegation of legislative power to an administrative agency, and that, if delegable at all, the power is controlled by no ascertainable or intelligible guides or standards. Instead, the majority opinion assumes the invalidity of the Act, as regards real estate, and holds that even if subsection 14(b)(1) were deleted from the Act, the appellant cannot complain of being taxed at "current value without any allowance for inflation", when the statute, as modified, requires that real estate to be taxed in the same manner. I think the conclusion is unsound for several reasons.

The argument that the legislature would have passed the Act with the subsection as to real estate omitted, and hence that the Act is saved by the separability clause, seems untenable. The declared purpose was to continue

the disparity. If both real and personal property were to continue to be assessed according to the same standard of full cash value, there would have been no occasion to amend the pre-existing law. The vice found in the *Sears* case was that the State Tax Commission had deliberately undervalued, or permitted the undervaluation, of real estate. If statutory authority for the practice is stricken down, we are just where we were before, unless the *Sears* case is to be overruled. If *Sears* is overruled we are faced with the question of the Fourteenth Amendment.

The majority opinion seems to hold, however, that the difference in treatment can be supported on the ground that real estate and personal property are now placed in different classes. But such "classification", to my mind, is wholly illusory if, as the Court assumes, real and personal property are to be taxed at the same rate and upon the same assessable basis. If real and personal property are required to be treated alike for tax purposes, a mere legislative declaration that they are different in other respects is meaningless. The complaint that they are not treated alike in practice goes to the heart of the matter and raises again the question decided in the *Sears* case.

I revert to the question as to the validity of subsection 14 (b) (1), left unanswered in the majority opinion for reasons which I think are unsound. The term "inflation" is not defined in the Act, and accordingly the word must be taken in its common or popular meaning. Although economists may differ as to its causes, such as the pressure for wage increases, governmental policies, and the expansion of money supply and credit, the term in its popular sense connotes the decline in the purchasing power of the dollar, coincident to the general rise in prices, which has been continuous, though not constant in rate, at least since 1939, the year of the outbreak of the second World War. It is sometimes measured by the so-called "cost of living" index. Of course, the amount of inflation, or the price level, at any given time depends upon the initial or base time or year with which it is compared. A directive to the taxing authorities to make "an allowance for inflation, if in fact

inflation exists", sets up no guide or standard. The amount to be allowed would depend in each case upon the point of reference, which is not designated. Inflation exists both as regards real and personal property. Its amount depends on the arbitrary selection of a previous price level. As I see it, the legislative directive is an open invitation to the taxing authorities to reduce assessments on real estate to whatever percentage of full cash value they please. This was precisely the vice we found in the *Sears* case. The directive supplies no point of reference, and hence leaves the matter to the uncontrolled discretion of the taxing authorities, without any objective standard at all.

The appellee argues that the standard in regard to inflation is no more vague than that of full cash value itself. I cannot agree. The latter term, over the years, has acquired a rather definite meaning. An accepted test is current market value, based on a compilation of comparative sales, to determine a value based on the present conditions as reflected in the market place. No doubt, much must be left to the honest judgment of the assessors. Valuation is not an exact science. Actual sales prices should be evaluated to determine whether they are normal or forced according to the test laid down by the courts of a willing buyer and a willing seller. The particular property should also be considered in the light of its age, size, desirability, potential uses, and other factors. Appraisals may take into account original cost and reproduction cost; in some instances, a capitalization of income. Still, the tests are objective. This is a far cry from the deliberate undervaluation of property at some undisclosed and arbitrary percentage of full cash value.

The record in the instant case does not disclose what yardstick was applied by the State Tax Commission to the aesessment of real property. It is conceded that it applied the test of full cash value to personal property. The Secretary to the Commission testified that "roughly speaking, real estate was assessed at 60% of the assessed value". There was no effort to justify the end result in terms of "inflation", or to explain the basis for its selection of that

average figure. I cannot see how a deliberate undervaluation of this sort can be other than arbitrary and capricious. It is simply an example of the unsound assessment practice of "trending back", which seeks to solve the problem by selecting a supposedly "normal" base year, in the hope that prices may eventually decline to that level. The hope seems vain in the light of the experience of the past twenty years. The result is to shift the tax burden from one class to another, or from one group to another, without any objective standard, making it difficult, if not impossible, for any taxpayer to successfully challenge his own assessment, by proving that others are more favored. For a discussion of the problem, see the extensive note on *Tax Assessments of Real Property* in 68 Yale L.J. 335. See also Johnson, *Should Property Be Assessed at Full Current Value?* 7 Journal Of Taxation, 316. For the reasons stated I think the appellant is entitled to the relief indicated in the *Sears* case, to which it would clearly have been entitled in the absence of the retroactive statute under consideration. Cf. *Cromwell v. Jackson*, 188 Md. 8, 29; *State v. Rice*, 115 Md. 317 327.

In the Court of Appeals of Maryland

(No. 28, September Term, 1957)

Sears, Roebuck & Company

v.

State Tax Commission Of Maryland

Decided November 22, 1957

Reported in 214 Md. 550, 136 A. 2d 567

Appeal from the Circuit Court No. 2 of Baltimore City (CULLEN, J.).

Petition of appeal by Sears, Roebuck & Company, a New York corporation, from an assessment made by the State Tax Commission of Maryland on its stock in trade. From an order affirming the assessment of the Commission, petitioner appeals.

Reversed, with costs, and case remanded for further proceedings.

The cause was argued before BRUNE, C. J., and COLLINS, HAMMOND and PRESCOTT, J.J.

COLLINS, J., delivered the opinion of the Court.

This is an appeal by Sears, Roebuck and Company, (Sears), appellant, from an assessment made by the State Tax Commission of Maryland, (Commission), appellee, on its stock in trade. Sears appealed to Circuit Court No. 2 of Baltimore City. From an order of that court affirming the assessment of the Commission, Sears appeals here.

The statutory provisions under consideration in this case are Code, 1951, Article 81:

"13. (a) Except as hereinafter provided, all property directed in this Article to be assessed, shall be assessed *at the full cash value thereof* on the date of finality.* * *" (Italics supplied).

"14. The stock in business of every person, firm or corporation engaged in any manufacturing or commercial business in this State shall be valued and assessed to the owner thereof on the date of finality at its fair average value for the twelve months preceding the date of finality,* * *. Provided, however, that for county taxation in Anne Arundel County and Frederick County, and for municipal taxation in the City of Frederick such stock in business shall be assessed at seventy-five per centum (75%) of such fair average value for the twelve months preceding the date of finality."

"230. The jurisdiction, supervision, powers and duties of the State Tax Commission herein created and established shall extend under this Article: * * *

"(7) To formulate, whenever the Commission shall deem it practicable, standards or units for the assessments of various kinds of property, and to issue instructions to local supervisors of assessments in regard thereto and to require the use thereof. To confer with County Commissioners and the Appeal Tax Court of Baltimore City and visit each county as often as necessary."

Sears owns and operates retail stores in Allegany, Anne Arundel, Cecil, Dorchester, Frederick, Montgomery, Washington and Wicomico Counties, and in Baltimore City. It calculates the cost of its merchandise for the purposes of Maryland tangible personal property taxes by means of the FIFO, (first in, first out), accounting method.

The facts which follow are contained in an agreed statement of Undisputed Facts, pursuant to Rule 828 g of Maryland Rules of Procedure. The Commission, by virtue of the authority conferred upon it by the General Assembly, is required to supervise the assessments of all property in the counties and cities of this State so that all taxable property shall be entered upon the assessment rolls and equalized between persons, firms and corporations. In Maryland real property is valued for assessment purposes by the Supervisors of Assessments of the counties and Baltimore City. The personal property of corporations, including stock in trade, is valued for assessment purposes by assessors who are members of the staff of the Commission. Both of these groups of assessors are subject to the control and supervision of the Commission.

As above stated, it is provided by Code, 1951, Article 81, Section 13 (a), that all property shall be assessed at its full cash value on the date of finality. The Supervisors in the various counties and in Baltimore City have been instructed by the Commission to assess all taxable property in this State at its full cash value. There is no statutory definition in Maryland of the term "full cash value". It is agreed that: "The administrative definition of the term 'full cash value' which has been adopted by the Commission with

respect to real property, however, is an entirely different concept from the Commission's definition of that term as applied to stock in trade owned by corporations. With respect to real estate, the Commission has directed its assessors to deduct amounts resulting from inflationary influences from the value of the properties to be assessed. This deduction reduces the value of real estate for tax purposes below its current value. No similar deduction is made in the case of assessment of stock in trade." In assessing inventories inflationary influences as such are not considered. Instead the assessment is at cost or market, whichever is lower. In the assessment of such inventories abnormalities, such as pilferage, are considered in arriving at cost or market. The level of the aforegoing assessments to current value is the direct result of the policies and practices of the Commission which by law is required to supervise all assessment of real property within this State. Various studies had been made as to the level of assessments to current values of real estate in the counties and in Baltimore City. These studies vary in scope and in method. However, they sustain the same factual conclusion that the ratios of assessments to current values of real estate in Maryland ranged from twenty-five per centum to sixty per centum at the time this case was heard by the Commission.

The business of the appellant is selling goods at retail, and to conduct such business it had a large stock of personal property in its inventory which was assessed for property taxes by the Commission at its current value, that is, cost or market, whichever was lower. The Commission, in assessing Sears' stock in trade, made no allowance for the impact of inflation, which it allowed in assessing real estate. As inflation increased the value of real estate, it likewise caused an increase in the value of Sears' inventories. The rise in the levels of department store inventory prices was similar to the rise in other composite price series. Inflation, which has increased both the values of real estate and stock in trade, has caused a substantial rise in Sears' inventory in Baltimore and in the counties. Since 1941 Sears' catalog shows an increase of eighty-four per centum in 1952; an

increase of seventy-nine per centum in 1953; and an increase of forty-one per centum in 1954. The rise in cost of goods has been approximately in the same proportion.

Sears contends under Section 13 (a), *supra*, as the General Assembly has stated that all property should be assessed at "full cash value" it has classified real and personal property alike for assessment purposes. Therefore the same economic yardstick should be used in making assessments against real and personal property as the statutes require the same standard of value.

The appellee contends that since Section 14, quoted above requires inventories to be assessed at "fair average value", the method of assessment is so different from that prescribed for real estate, that differences in result do not constitute unlawful or unconstitutional discrimination between taxpayers of the same class. This Court, in the case of *May Stores v. State Tax Commission*, 213 Md. 570, 132 A. 2d 593, discussed Section 14. It was there stated that the sole question to be determined was whether the refusal of the Commissioners to accept the LIFO method of calculating the fair average value of the tangible personal property of the appellant for the twelve months preceding the date of finality was unlawful, unreasonable or against the substantial weight of the evidence. This Court there adopted the opinion of the Commissioners, which stated, among other things, the following: "Cost or market, whichever is lower, is a fair indication of the reasonable value of inventory provided that either the cost or the market value is established as of recent date." It is evident that the words "fair average" applied to inventories and stock in business, recognize the fact that the size of inventories fluctuate over the annual period and the value of the inventory should be based upon a representative amount and representative price for the inventory, not according to the amount of stock on hand on the date of finality, but on the fair average for the twelve months preceding the date of finality. Fair average means an average typical of the amount and price of goods acquired over the twelve month period.

Section 13 (a) prescribes a standard of assessment of property to be followed "except as hereinafter provided". That standard is "the full cash value thereof on the date of finality". Section 14, in dealing with stock in trade or inventory, does otherwise provide in one respect. This is to substitute (for the reasons just stated) an average value of inventory over a period of twelve months for what might be the value on some single day — the date of finality. That, we think, is the only purpose of this formula and hence it does not call for any further departure from the basic requirement of "full cash value * * * on the date of finality" contained in Section 13 (a). We are strengthened in this view because there is, we think, no substantial difference in meaning between "fair value" and "full cash value". See *Burke v. Fidelity Trust Co.*, 202 Md. 178, 96 A. 2d 254.

Appellee contends that this Court and the courts of other states have recognized that natural and inherent differences between various classes of property necessitate different ways of ascertaining their value for assessment purposes, and have long held that the use of different methods of assessment does not in and of itself violate constitutional or statutory requirements of uniformity and equality in the assessment and taxation of property. It relies on *Baltimore City v. The State*, 105 Md. 1, 65 A. 369; *Seaboard Commercial Corp. v. State Tax Commission*, 181 Md. 234, 29 A. 2d 294; *State Tax Commission v. C. & P. Telephone Co.*, 193 Md. 222, 66 A. 2d 477; *State Tax Commission v. Brandt Cabinet Works*, 202 Md. 533, 97 A. 2d 290; *Household Finance Corp. v. State Tax Commission*, 212 Md. 80, 128 A. 2d 640; and *May Stores v. State Tax Commission*, *supra*. The appellee relies on the case of *Sears, Roebuck v. Inhabitants of City*, 150 Me. 181, 107 A. 2d 475. It is true that the Court there held that different methods might be used for arriving at the value of property, but it was there stated that there should be no favoritism or discrimination between real and personal property. To the same effect are the following cases relied on by the appellee. *McLendon v. Cit. of LaGrange*, 107 Ga. 356, 33 S.E. 405; *People v. Pickard*, 377 Ill. 610, 37 N.E. 2d

330; *Worten v. City of Paducah*, 123 Ky. 44, 93 S.W. 617, decided in 1906. The case of *People v. Southwestern Bell Telephone Co.*, 377 Ill. 303, 36 N.E. 2d 362, relied on by the appellee, was based on a statute in Illinois which is not in effect in this State. In *Kentucky Finance Co. v. McCord* (Ky.), 290 S.W. 2d 481, decided in 1956, the decision turned on a 1915 amendment to a statute, not in effect here. The Commission, being a body of experts on taxation, *Seaboard Commercial Corp. v. State Tax Commission*, *supra*, may use any proper method for assessing property. However, the result must be to arrive at the statutory requirement of "full cash value". Of course, the method used to arrive at the full cash value of real estate may be different from the method used to arrive at the full cash value of inventories. As was stated in *Rogan v. Commissioners of Calvert County*, 194 Md. 299, 312, 71 A. 2d 47, the duty of the County Commissioners to follow the Commission's instructions as to the method or plan of assessment does not include the power of the Commission to require or the duty of the County Commissioners to make any departure from the statutory requirement to assess all property to be assessed at the full cash value on the date of finality.

In *Bemis Bros. v. Claremont*, 98 N.H. 446, 102 A. 2d 512, the plaintiff claimed that its stock in trade, along with that of other taxpayers, was assessed at one hundred per centum of its fair market value for 1951, while real estate and other property taxed as such were assessed at eighty, fifty-five and sixty per centum of such value. The New Hampshire statute provided that property was to be appraised at "its full and true value in money". The Constitution of that State provided that all taxes on "estates" shall be proportionable and reasonable, which means equal and just. The Supreme Court of New Hampshire pointed out that real estate was not assessed at the fair market value but rather at eighty per centum thereof. Machinery was assessed at sixty per centum, buildings were assessed at fifty-five per centum, and stock in trade was assessed at its full market value. The Court there said: "We find no

legal basis for assessing stock in trade at its full market value and real estate and other such property at varying percentages lower than its market value. * * * There is no foundation for the proposition that owners of one kind of property should pay more or less than their share of the common burden because of the character of their estate. * * * We are of the opinion that the assessment as made was in violation of the constitutional requirements of proportionality and equality." See also *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P. 2d 815; *Chastain's, Inc. v. State Tax Commission*, 72 Idaho 344, 241 P. 2d 167; *Hutchins v. Howard*, 211 Ga. 830, 89 S.E. 2d 183; *Delaware, Lackawanna & Western R.R. Co. v. Neeld*, 23 N.J. 561, 130 A. 2d 6; *Switz v. Middletown Township*, 23 N.J. 580, 130 A. 2d 15; *Sears, Roebuck v. Inhabitants of City, supra.*

In the case of *Hillsborough Township v. Cromwell*, 326 U.S. 620, 90 L. Ed. 358, a discriminatory treatment in the assessment of taxes was claimed in the State of New Jersey. The Supreme Court of the United States, in an unanimous opinion, in which Mr. Justice Murphy and Mr. Justice Jackson took no part, said: "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247; *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-29."

The appellee also contends that the taxpayers' remedy is not in attempting to be relieved of the assessment itself

but from restraining the Commission from not properly assessing other property. It relies on *Schley v. Lee*, 106 Md. 390, 67 A. 252, and *County Commissioners of Anne Arundel County v. Buch*, 190 Md. 394, 58 A. 2d 672, and *State Tax Commission v. Brandt Cabinet Works, supra*. Here, the appellant is not contending that any other assessment made under the direction of the Commission is too low. It is complaining that its assessment is too high. The discrimination here has been intentional and arbitrary. *Rogan v. Commissioners of Calvert County, supra*. The Supreme Court of the United States in *Hillsborough Township v. Cromwell, supra*, has ruled that the state itself must remove such discrimination. We are of opinion that the order of the Commission should be reversed.

Order reversed with costs, and case remanded for further proceedings.

APPENDIX C

MANDATE

Court of Appeals of Maryland

No. 29 Adv., September Term, 1959

National Can Corporation

v.

State Tax Commission of Maryland

Appeal from Circuit Court No. 2 of Baltimore City. Filed: April 27, 1959.

April 16, 1959: Joiht motion to advance case for argument filed and granted.

July 9, 1959: Order affirmed, with costs.

Brune, C J. Henderson, J. dissents and files dissenting opinion.

August 5, 1959: Motion for stay of execution of mandate filed.

September 1, 1959: Motion granted and mandate stayed.